LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUN 8 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 231

DUN & BRADSTREET, INC.,

Petitioner,

against

G. C. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CHESTER BORDEAU,
14 Wall Street,
New York, New York 10005.

ROBERT V. LIGHT,
1100 Boyle Building,
Little Rock, Arkansas 72201.
Counsel for Petitioner.

WHITE & CASE,
New York, New York.

SMITH, WILLIAMS, FRIDAY & BOWEN
Little Rock, Arkansas,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, N. Y. 10006, U. S. A.

INDEX TO PETITION.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
Argument for Granting Writ	9
Conclusion	15

Index to Appendix.

Constitution of the United States,	
Amendment I	1a
Amendment XIV	1a
Opinion of Court of Appeals	2a
Judgment of Court of Appeals	11a
Order of Court of Appeals Denying Petition for Rehearing	12a
Opinion of the Honorable J. Smith Henley, United States District Judge	13a

Table of Cases.

	PAGE
Dewey v. *Des Moines*, 173 U. S. 193, 199 (1898)	2
Fleckenstein v. *Friedman*, 266 NY 19 (1934)	11
Garretson v. *Louisiana*, 379 U. S. 64 (November 23, 1964)	3, 11
Griffin v. *California*, 85 S. Ct. 1229 (April 28, 1965)	2
Hearne v. *De Young*, 119 Cal. 670, 52 Pac. 150 (1898)	11
Hormel v. *Helvering*, 312 U. S. 552 (1941)	2
McGoldrick v. *Compagnie Generale Transatlantique*, 309 U. S. 430 (1940)	2
New York Times Co. v. *Sullivan*, 376 U. S. 254 (March 9, 1964)	2, 3, 9, 10, 11, 12, 15, 16
United Brotherhood of Carpenters and Joiners of America v. *United States*, 330 U. S. 395 (1946)	2
Wilson v. *United Press Association*, 343 Ill. App. 238, 98 N. E. 2d 391 (1951)	11

Statutes.

26 U. S. C. A. §6321	4
28 U. S. C. A. §1254(1)	2
United States Constitution,	
Amendment I	2, 3, 9, 15
Amendment VIV	3, 9, 15

Other Authorities.

"Libel and the First Amendment—a New Constitutional Privilege" by Professor Arthur L. Berney, Virginia Law Review (Volume 51, No. 1, January 1965)	15
"New York Times Co. *v.* Sullivan—The Scope of a Privilege", a Note in the Virginia Law Review for January, 1965 (Volume 51, No. 1)	16
Prosser, *Law of Torts*, 2d Ed. 632 (1955)	10

PAGE

Restatement, *Torts* §382 11

"The New York Times Case: A Note on 'The Central Meaning of the First Amendment' ", by Professor Harry Kalven, Jr., 1964 The Supreme Court Review, at page 220 ..... 13, 15

Supreme Court of the United States

OCTOBER TERM, 1965.

No. .....

DUN & BRADSTREET, INC.,

Petitioner,

against

G. C. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Dun & Bradstreet, Inc., prays that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit for review of the decision of that court entered on February 3, 1965.

Opinions Below.

The opinion in the Court of Appeals for the Eighth Circuit affirming the judgment of the United States District Court for the Eastern District of Arkansas is reported at

340 F. 2d 882 and may be found at page 3a of the appendix to this brief.[1] The judgment of that court may be found at page 11a. The opinion of the Honorable J. Smith Henley, United States District Judge may be found at page 13a.

Jurisdiction.

The judgment of the Court of Appeals for the Eighth Circuit sought to be reviewed was entered on February 3, 1965. A timely petition for rehearing was filed on February 22, 1965, and was denied on March 16, 1965.

The oral argument in the Court of Appeals was held on March 9, 1964. On that same day, this Court decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Discussion in briefs and oral argument with respect to *New York Times Co.* was necessarily precluded. The constitutional considerations suggested initially[2] by *New York Times Co.* were argued in the petition for a rehearing which was denied by the Court of Appeals[3] (page 21 of Proceedings in Court of Appeals, Vol. II of R)

The statutory provision conferring jurisdiction on this Court is contained in 28 U. S. C. A. §1254(1).

Questions Presented.

1. Does the determination made by the Court of Appeals deny petitioner's protection under Amendments I

---

[1] Numbers in parentheses are references to the appendix to this brief; or to the record, R , unless otherwise indicated.

[2] See references in footnote 7.

[3] This Court has not hesitated to consider issues not raised at the trial level when rulings by it have been delivered in the interim affecting applicable rules of law. *Dewey* v. *Des Moines*, 173 U. S. 193, 199 (1898); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940); *United Brotherhood of Carpenters and Joiners of America* v. *United States*, 330 U. S. 395 (1946); *Hormel* v. *Helvering*, 312 U. S. 552, 557, 558, 559 (1941). This is particularly true with respect to constitutional questions. *Griffin* v. *California*, 85 S. Ct. 1229 (April 28, 1965).

and XIV of the Constitution of the United States in failing to comply with interpretations and applications of those amendments made by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (March 9, 1964); *Garreston* v. *Louisiana,* 379 U. S. 64 (November 23, 1964), by applying a definition of the defense of truth contrary to the rulings of this Court?

2. Does the determination made by the Court of Appeals deny petitioner's protection under Amendments I and XIV of the Constitution of the United States in failing to adhere to interpretations and applications of those amendments made by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (March 9, 1964), by applying a definition of malice contrary to the ruling of this Court in that case?

Statutes Involved.

The First and Fourteenth Amendments of the Constitution of the United States are set forth at 1a.

Statement of the Case.

This diversity action in libel was tried before the United States District Court for the Eastern District of Arkansas resulting in a verdict against petitioner for $40,000 actual damages and $10,000 punitive damages (R 1, 542).

Petitioner is a mercantile agency which gathers, evaluates and furnishes to its subscribers confidential credit information upon their inquiry therefor. Respondent is a trustee in bankruptcy of plaintiff Fordyce Wood Products, Inc. (Fordyce) which was engaged in the business of manu-

facturing various wood products in Fordyce, Arkansas. In early 1963, it was adjudged a bankrupt and respondent Nicklaus was substituted as plaintiff. (R 547)

A notice of tax lien (26 U. S. C. A. §6321) was filed on November 28, 1960, on behalf of the United States against plaintiff in the office of the Circuit Clerk and Recorder of Dallas County, Arkansas, for delinquent taxes withheld by plaintiff for wages paid to its employees for the second quarter of 1960, and penalty for late payment for the first quarter. (R 8, 9)

On November 29, 1960, Mrs. Morgan, a "record item correspondent" for petitioner in Dallas County, examined the lien records and completed a printed form to report the filing of the lien. Mrs. Morgan had become a correspondent for petitioner in 1956. She was in the Circuit Clerk's office on November 29, 1960. Mrs. Morgan heard Mrs. Thornton, the Deputy Clerk, say that a Mr. Bradley, who had filed the notice of tax lien on behalf of the Internal Revenue Service, had said that he was going to the bank and file it. Accordingly, Mrs. Morgan added to the printed form reporting the filing of the lien the notation "Also lien filed on Bank Account by U. S. A." The following report was prepared and furnished to 51 of petitioner's subscribers who had previously requested information regarding Fordyce:

"PLAINTIFF'S EXHIBIT 30 (R 24)

SPECIAL
NOTICE
DUN & BRADSTREET REPORT
SN 85 DECEMBER 6, 1960
MGF MOLDINGS

FORDYCE WOOD PRODUCTS, INC. 1946—
401 So RUSSELL
FORDYCE ARK
DALLAS COUNTY

FOLLOWING INFORMATION TAKEN FROM LIEN RECORDS —

Suit styled U.S.A., vs. Fordyce Wood Products, Inc., filed Nov. 28, 1960, cause of action, withhold tax for 1st and 2nd quarter of 1960. Lien filed; also, lien filed on bank account of subject by U.S.A. 12-6-60 (PR 51)"

The portion of the printed form utilized by Mrs. Morgan was captioned "Suits or Judgments" (R 97), and while there was no testimony from the person who actually prepared Plaintiff's Exhibit 30 the obvious and sole explanation for use of the words "suit filed" is the printed caption on the report submitted by Mrs. Morgan (See R 107).

Initial distribution of this report was made on December 6, 1960.

On March 6, 1961, the president of Fordyce became aware this report had been published by petitioner. A second report dated March 6, 1961 was thereupon published.[4]

[4] Three of petitioner's subscribers to whom the first report had been sent were not sent the second report by reason of the fact that their subscription agreement had expired.

This report of March 6, 1961, read as follows:

"PLAINTIFF'S EXHIBIT 33 (R 24)

SPECIAL
NOTICE

DUN & BRADSTREET REPORT
SN 85 MAR 6 1961 N
MFG MOLDINGS

FORDYCE WOOD PRODUCTS, INC. 1946—
401 So. RUSSELL
FORDYCE ARK DALLAS COUNTY

Further investigation reveals tax lien filed by U. S. A. vs. Fordyce Wood Products, Inc., on Nov. 28, 1960, was satisfied and released of record, Dec. 1, 1960. It is further understood that lien on bank account has also been satisfied 3-6-61. (066c-9)."

After suit had been commenced by Fordyce on December 5, 1961 (R 1-6), petitioner made answer thereto and set up as defenses substantial *truth* and *qualified privilege* (R 13-16).

As noted above, the jury returned a verdict against petitioner for $40,000 actual damages and $10,000 punitive damages (R 542).

On the defense of *substantial truth,* the court instructed the jury as follows:

> "Taking up first the element of falsity, although the defendant contends that the statements or reports in question were substantially true, the Court now tells you as a matter of law that the statements were in fact false, and that you may consider that the first element of plaintiff's claim has been established as a matter of law." (R 535)

to which objection was made by petitioner as follows:

> "The defendant objects to the Court's instruction to the jury that the publications in question are false

as a matter of law, for the reason that the testimony would support a finding of fact by the jury that these reports were substantially true, and that the part of the reports that were literally true was the sting of the reports, and the defendant, therefore, requests that the Court submit that issue to the jury for a finding of fact.

"The Court: All right, that request will be denied." (R 530)

With respect to *qualified privilage, and malice* the trial court instructed the jury as follows:

"As to defendant's claim of conditional privilege, you are told that a financial reporting company, such as Dun & Bradstreet, is not an insurer of the accuracy of the financial reports which it disseminates to its subscribers. Such reports are said to be 'conditionally privileged,' and as long as such reports are published in good faith and without malice and as long as the privilege is not abused, the reporting agency is not liable to the subject or subjects of the reports on account of misinformation appearing therein.

"Now, this rule of conditional privilege is a legal protection based upon a public policy which recognizes that it is essential that true financial and credit information, with respect to individuals and corporations engaged in business or seeking credit shall be readily available to those having a legitimate interest in securing such information. In order that such information shall be given freely, it is necessary to afford protection to reporting agencies against liability for misinformation given in an honest and reasonable effort to provide the information sought. It is the position of the defendant that even if the statements in question were false, defamatory and damaging, still they were circulated in good faith and without malice, and that there is no liability on defendant's part.

"The Court now tells you that the dissemination of the two reports in question were occasions of conditional privilege. Therefore, even though you may find from a preponderance of the evidence that the reports, or either of them, were false, defamatory, and damaging, nevertheless your verdict must be for the defendant unless you further find from a preponderance of the evidence that the reports were disseminated with malice or that the defendant abused its conditional privilege by excessive publication of the reports. The burden of proving the existence of malice or the excessive circulation of the reports by a preponderance of the evidence is on the plaintiff.

"Now 'malice,' as I have used this term, means the doing of a wrongful act, either in a personal sense, as the doing of an act intentionally that is wrong, or the doing of an act actuated by spite, grudge, hatred, ill will or evil intent, or, in the impersonal sense such as the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights of others as to constitute ill will.

"I might say, Members of the Jury, that the plaintiff does not contend in this case that the defendant acted with malice in the personal sense just outlined, that is with any spite, grudge or hatred, but it does contend that the defendant acted with malice in the impersonal sense, that is to say that the publications of the statements as published were without just cause or excuse, and were characterized by such a conscious indifference or reckless disregard as to their results or effects upon the rights of plaintiff as to constitute ill will." (R 536, 537)

With respect to the charge relating to *malice,* petitioner made appropriate objection. (R 532, 543, 544)

Reasons for Granting the Writ.

1. To determine whether Amendments I and XIV have application to actions in libel involving false defamatory statements concerning private citizens under circumstances of privilege as distinguished from public officials with respect to their official conduct as ruled in *New York Times Co.*

2. To determine whether constitutional principles apply in determining whether a qualified privilege in a libel action not involving a public official and his public acts is destroyed only by malice as defined in *New York Times Co.*

3. To determine whether substantial truth in an action for libel involving a non-public official is a matter of defense or whether plaintiff must carry the burden of proof to establish the falsity of the alleged defamatory matter and to consider the constitutional adequacy of proof with respect thereto.

4. To determine whether the casting of the burden of proof on a defendant to establish the truth of an alleged defamatory statement constitute a denial of constitutional protections under Amendments I and XIV.

5. The problems involved are of great and important public interest which should be remedied by this Court.

Argument for Granting the Writ.

Petitioner urges that the failure of the trial court and of the Court of Appeals to comply with its request that its defense of *substantial truth* be submitted to the jury was a violation of the petitioner's rights to protection

under the First and Fourteenth Amendments. This Court in *New York Times* in referring to a publication containing some true and some false statements stated (page 289):

> "The ruling is that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here."

In the case at bar, the trial court ruled that the report sued upon was false as a matter of law and refused to submit the question of substantial truth of the alleged defamatory matter to the jury. Of course, the substantial truth of the publication complained of would have been a complete defense to this action in libel.

It is stated in Prosser, *Law of Torts*, 2d Ed. 632 (1955):

> "* * * it is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail and that it is sufficient to show that the imputation is substantially true, or, as it is often put to justify the 'gist' or 'sting' of the defamation."

The trial court's charge (R 532-542) does not purport to submit any question for the jury's determination as to what was the "sting" or "gist" of the reports. Petitioner sought to have the question submitted to the jury. (R 530) The request was denied. (R 530) The Court of Appeals, though urged, overlooked the failure of the trial court to submit to the jury in any form the question of what the "sting" or "gist" of a publication was. The effect of the trial court's charge was to hold, as a matter of law, that the "sting" or "gist" of the reports was false. Mr. Justice Brennan in *New York Times Co.* (page 271) stated:

> "Authoritative interpretations on the First Amendment guarantees have consistently refused to

> recognize an exception for any test of truth, whether administered by judges, juries, or administrative officials—and especially not one that puts the burden of proving truth on the speaker. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 525-526. The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 445."

For the trial court to have required petitioner to prove the literal truth of all published words, destroyed petitioner's protected constitutional right to publish substantial truth. The authorities have consistently held that no liability exists if the assailed publication is substantially true, i.e., if the "gist" or "sting" of the alleged libel is true. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (March 9, 1964); *Fleckenstein* v. *Friedman*, 266 N. Y. 19, 23 (1934); *Hearne* v. *De Young*, 119 Cal. 670, 52 Pac. 150 (1898); *Wilson* v. *United Press Association*, 343 Ill. App. 238, 243, 98 N. E. 2d 391, 393 (1951); Restatement, *Torts* §582 (1938).

Whenever a publisher is deprived of traditional defenses in a libel action, the First Amendment is violated, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269; *Garretson* v. *Louisiana*, 379 U. S. 64 (November 23, 1964).

Petitioner further urges that a writ of certiorari should be granted for the reason that the Court of Appeals erroneously applied constitutional principles to the facts relating to *malice* contrary to the ruling of this Court in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269, 287. The Court of Appeals in the case at bar emphasized at 340 F. 2d 886 (1965) (9a):

> "We think that there was sufficient evidence of 'conscious indifference' for the district court to properly

> submit this issue [malice] and the matter of punitive damages to the jury. The most significant evidence reveals that there was no review by anyone having authority in appellant's organization."

The reference is to a review of the report compiled and distributed by petitioner to its subscribers upon their request therefor. It is stated that the failure of someone having authority in petitioner's organization to review or check what Mrs. Morgan had reported, prior to its publication by petitioner, constituted evidence of malice. Mrs. Morgan had experience as correspondent of petitioner for some four or five years prior to her having furnished the information published by petitioner. The ruling by the Court of Appeals is directly contrary to the conclusion reached by this Court in *New York Times Co.* (page 287).

Petitioner urges that its constitutional rights under the First and Fourteenth Amendments of the Constitution guaranteeing the freedom of speech and of the press have been violated and seeks protection from this Court.

Mr. Justice Brennan in *New York Times Co.* stated at page 285:

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser* v. *Randall*, 357 U. S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v.

Florida, 328 U. S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

"Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. * * *, there was no evidence whatever that they [defendants] were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support."[5]

At page 287, Mr. Justice Brennan noted:

"Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. * * * We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is con-

[5] A scholar has noted:

"The Court makes actual malice a 'constitutional fact' that it will review de novo and indeed did review de novo in the case itself. There is thus some protection afforded against a too facile or disingenuous finding of the existence of malice." See "The New York Times Case: A Note on 'The Central Meaning of the First Amendment'", by Professor Harry Kalven, Jr., 1964 The Supreme Court Review, at page 220.

stitutionally insufficient to show the recklessness that is required for a finding of actual malice." [citations omitted]

The trial court in its charge to the jury referred to excessive publication by petitioner of the reports claimed to be defamatory as follows:

> "As to the claim of plaintiff that the defendant was guilty of excessive publication of the reports, you are told that in order to avail itself of its qualified or conditional privilege in connection with the dissemination of financial information to its subscribers, a reporting agency such as the defendant is required to confine the circulation to subscribers who have a legitimate interest in the financial status or affairs of the subject of the reports." (R 538)[6]

The Court of Appeals pointed out that the jury returned a general verdict and there was no way to know whether the jury found excessive publication or not. It stated that (10a):

> "Certainly the jury did find malice (awarded punitive damages) and, as discussed earlier, there was

---

[6] The evidence in this case established that the reports were distributed to petitioner's subscribers who had made inquiry with respect to plaintiff Fordyce except, possibly, one of petitioner's subscribers, Mr. Harry Russell, who had business dealings with plaintiff Fordyce (R 57, 58, 59), and who testified (R 59):

> "Q. All right, now, in connection with this proposal on or about that time or afterwards did you receive a report from Dun & Bradstreet with reference to Fordyce Wood Products? A. Yes, but it was not a requested report, because we already had that in our files.
>
> Q. What do you mean? A. One of the regular, normal procedures that we would use, we had that in our file."

This subscriber's interest in the financial condition of plaintiff Fordyce is sufficient to establish the privilege of defendant, as noted by the trial judge, in furnishing him with the information relating to plaintiff Fordyce. In any event, furnishing of the report to this subscriber would not have destroyed the privilege with respect to other subscribers who had made inquiry of petitioner for information respecting plaintiff Fordyce.

substantial evidence of malice. Due to these facts we are of the opinion that the matter of whether or not there was sufficient evidence of excessive publication is immaterial, moot, and certainly not prejudicial."

The report was furnished, according to the uncontradicted evidence in the record of this case, to those subscribers of petitioner who had made inquiry therefor under their subscription agreement, except as noted above.

Certainly it was error for the trial court and for the Court of Appeals to disregard the errors made with respect to any finding of malice based upon excessive publication. This again constituted a violation of petitioner's constitutional rights (page 285 of *New York Times Co.*).

Conclusion.

For the foregoing reasons demonstrating that petitioner has been denied constitutional protection under Amendments I and XIV; and in view of the fact that the questions presented are novel and important,[7] the petition for a writ of certiorari should be granted.

---

[7] For example, in "The New York Times Case: A Note on 'The Central Meaning of the First Amendment'", by Professor Harry Kalven, Jr., 1964 The Supreme Court Review, it is stated at page 191:

> "Since the case involved a rare instance of measuring the common law of defamation by constitutional standards, it clamors for a careful determination of how much of that traditional body of tort law is affected by it. And for the torts teacher, it has the dizzying consequence of transmuting a part of his domain—one that he traditionally does not reach until the last day of the semester—into constitutional law, the Valhalla of the law school curriculum."

In "Libel and the First Amendment—a New Constitutional Privilege" by Professor Arthur L. Berney, Virginia Law Review (Volume 51, No. 1, January 1965), it is stated at page 1:

Dated: June 8, 1965.

Respectfully submitted,

CHESTER BORDEAU,
14 Wall Street,
New York, New York 10005

ROBERT V. LIGHT,
1100 Boyle Building,
Little Rock, Arkansas 72201,
Counsel for Petitioner.

WHITE & CASE,
New York, New York.

SMITH, WILLIAMS, FRIDAY & BOWEN,
Little Rock, Arkansas,
Of Counsel.

"However, our High Court was having none of the law's 'disjointed incrementalism' when it for the first time found libelous utterance protected under the first amendment."

In "New York Times Co. *v.* Sullivan—The Scope of a Privilege", a Note in the Virginia Law Review for January, 1965 (Volume 51, No. 1), it is stated at page 106:

"Applying the first amendment to the law of libel for the first time, the Supreme Court in *New York Times Co.* v. *Sullivan* held that the constitutional guarantees of freedom of speech and of the press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct."

Mr. Justice Goldberg in his concurring opinion in *New York Times Co.* v. *Sullivan*, stated at page 299:

"We must recognize that we are writing upon a clean slate." [And see footnote 3 to his opinion.]

APPENDIX.

Constitution of the United States.

* * * * * *

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * * *

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 17,421

DUN & BRADSTREET, INC.,
Appellant,

vs.

G. C. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.,
Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[February 3, 1965.]

Before VOGEL and MATTHES, Circuit Judges, and HARPER, District Judge.

HARPER, District Judge:

This is an appeal in a libel action where trial to a jury resulted in a verdict against defendant (appellant) for $40,000.00 actual damages and $10,000.00 punitive damages.

Appellant (also referred to as Dun & Bradstreet or defendant) is a mercantile agency which gathers, evaluates and disseminates to its subscribers confidential credit information. Fordyce Wood Products, Inc. (also referred to as Fordyce or plaintiff) was engaged in the business of manufacturing various wood products in Fordyce, Arkansas, and from 1955 until the time of trial of this cause in December, 1962, was under the management of John H. Stucker, an experienced woodworking manufacturer. In early 1963,

plaintiff was adjudged a bankrupt; thereafter, the trustee was substituted as appellee.

A Notice of Tax Lien (26 USCA 6321) was filed on November 28, 1960, on behalf of the United States against plaintiff in the office of the Circuit Clerk and Recorder of Dallas County, Arkansas, for delinquent taxes withheld by plaintiff from wages paid to its employees for the second quarter of 1960, and penalty for late payment for the first quarter.

On November 29, 1960, Mrs. Morgan, a "record item correspondent" for Dun & Bradstreet in Dallas County, examined the lien records and completed a printed form to report the filing of the lien. While Mrs. Morgan was in the Circuit Clerk's office on November 29th she overheard a deputy clerk say that Mr. Bradley, who had filed the Notice of Tax Lien, had remarked that he was going to the bank and file it. Mrs. Morgan sent her report to the Dun & Bradstreet office in Little Rock, where the following report was prepared and sent to fifty-one Dun & Bradstreet subscribers who had previously requested information regarding Fordyce:

> "FOLLOWING INFORMATION TAKEN FROM LIEN RECORDS—
>
> "Suit styled *U. S. A.* vs. *Fordyce Wood Products, Inc.*, filed Nov. 28, 1960, cause of action, withhold tax for 1st and 2nd quarter of 1960. Lien filed; also, lien filed on bank account of subject by U. S. A. 12-6-60."

Initial distribution of this report was on December 6, 1960.

On March 6, 1961, plaintiff became aware that this report had been published. This resulted in the publication of the following report on March 6, 1961, which was distributed to forty-eight of the fifty-one subscribers who had received the first report, as follows:

> "Further investigation reveals tax lien filed by *U. S. A.* vs. *Fordyce Wood Products, Inc.*, on Nov. 28, 1960, was satisified and released of record, Dec. 1,

1960. It is further understood that lien on bank account has also been satisfied."

The lien was satisfied of record on December 1, 1960. On December 5, 1961, Fordyce filed this suit against Dun & Bradstreet alleging that these two reports were false and defamatory, had been published by defendant with malice, and had caused plaintiff to sustain actual damages. Punitive damages were also sought. Trial to a jury resulted in a verdict against defendant for $40,000.00 actual damages and $10,000.00 punitive damages. Defendant contends that the verdict should be reversed and dismissed, or in the alternative, reversed and remanded for new trial.

The appellant complains that the court committed error in instructing the jury that the reports were false as a matter of law. Instructions must be considered as a whole. The court instructed the jury in part as follows:

> "* * * Before the plaintiff can recover anything in this action it must prove by a preponderance of the evidence: First, that one or both of the reports or statements * * * referred to in the evidence was or were false. Second, that such statement or statements was or were defamatory. And, third, that such statement or statements was or were a proximate cause of damage to the plaintiff. Unless you so find all of those three things, your verdict must be for the defendant. * * *
>
> "Taking up first the element of falsity, although the defendant contends that the statements or reports in question were substantially true, the court now tells you as a matter of law that the statements were in fact false, and that you may consider that the first element of plaintiff's claim has been established as a matter of law."

The defendant contends that the giving of the preceding paragraph was error. The defendant properly objected to this part of the instruction at the time of the trial. In

order to properly determine whether such was error, it is necessary that the entire charge be examined, and it is pertinent that we set out a part of the charge which immediately followed that part of which the appellant complains:

> "I think that I should tell you in this connection that the falsity of the report of December 6 lay in the fact that it advised its recipients that a suit had been filed by the United States against plaintiff, that a federal tax lien had been filed against plaintiff, and, further, that an additional lien had been filed against plaintiff's bank account. Now, while it is true that on November 28, 1960, the Government filed a notice of an internal revenue tax lien against plaintiff with the Circuit Clerk of Dallas County, Arkansas, there was never any suit filed against the plaintiff by the Government, and there was never any specific lien filed against the bank account, although, of course, the general notice of lien affected the bank account as well as plaintiff's other assets.
>
> "The second statement was false in that it referred again to a specific lien against the bank account whereas there was never any such specific lien.
>
> "Of course, the mere fact that the statements were false is not alone sufficient to justify you in returning a verdict for the plaintiff. As I have stated, you must further find that the statements, or at least one of them, was or were defamatory, and that the falsity and the defamatory nature, if any, of the statement or statements was a proximate cause of damage to the plaintiff; and the burden is on the plaintiff to establish the defamatory nature of the statements and damage resulting therefrom by a preponderance of the evidence."

While the trial court instructed the jury that the reports were false as a matter of law, the instruction in the next

two paragraphs clearly points out to the jury why the reports were false, and further points out that that part of the reports regarding the filing of an internal revenue tax lien against plaintiff with the Circuit Clerk of Dallas County, Arkansas, was true.

The jury was immediately thereafter told that the mere fact the statements were false was not alone sufficient to justify their returning a verdict for the plaintiff, but the plaintiff had to further prove by the preponderance of the evidence that the statements, or at least one of them, were defamatory and that the falsity and the defamatory nature of the statement or statements was the proximate cause of damage to the plaintiff to recover.

The court did not need to present the question of falsity of the reports to the jury since there were no fact questions for the jury to consider. The court properly instructed the jury that the false parts of the reports were that there never was any suit filed against plaintiff by the government and there never was any specific or separate lien filed against the bank account. There was no question or issue as to whether these two parts of the reports were false as the parties stipulated to the following: "No complaint was filed in any court, nor was there any lien filed separately or specifically against the plaintiff's bank account." Since there was no genuine issue of fact on the truth or falsity of the reports, the court's instructions with respect to the reports were proper.

Appellant's main argument is addressed to the point that the "gist or sting" of the reports lay in the true part and the readers of such reports reacted differently; therefore, the court committed error in giving its instruction that the reports were false as a matter of law. Such a contention, however, fails to consider the fact that such considerations actually relate to the matter of whether the reports were defamatory, or if defamatory, were the proximate cause of plaintiff's damages. These considerations were specifically left to the jury for their consideration by the court's instructions. When the paragraph of the charge of which the appellant complains is read as

a part of the whole charge, and we further consider the stipulation of the parties with respect to the reports, the instruction as given correctly stated the applicable law.

Appellant, at the close of plaintiff's case and again at the conclusion of all the evidence, moved for a directed verdict. Subsequent to the jury verdict, appellant moved for judgment n.o.v. (Rule 50(b)). The asserted ground was the insufficiency of the evidence in four particulars: One, fact of legal damage; two, amount of legal damages; three, existence of malice; and four, occurrence of an excessive publication. Appellant contends that the trial court committed error in overruling its motions because the sufficiency of the evidence to support the verdict on the disputed issues of fact must be measured by the federal standard and not by the contended lesser requirements set forth in *Dun & Bradstreet, Inc.* v. *Robinson,* 233 Ark. 168, 345 S.W.2d 34 (hereinafter referred to as the *Robinson* case).

When the sufficiency of the evidence is questioned, the Arkansas and Federal courts will view the evidence in the light most favorable to the plaintiff. *Superior Forwarding Co.* v. *Garner,* 236 Ark. 340, 366 S.W.2d 290; *Aetna Life Ins. Co.* v. *McAdoo,* 115 F.2d 369; *Stofer* v. *Montgomery Ward,* 249 F.2d 285.

The federal standard for testing the sufficiency of the evidence requires that there be "substantial evidence" to support the verdict. *Hanson* v. *Ford Motor Co.,* 278 F.2d 586, 590.

Appellant contends that the Arkansas and federal standards for measuring the sufficiency of the evidence are in conflict and that this court is bound to apply the federal standard. Appellant concedes that prior to the *Robinson* case, the Arkansas and federal standards were the same and that "substantial evidence" was required in either instance to support a jury verdict. Appellant contends, however, that the Arkansas Supreme Court deviated from its former standard of requiring "substantial evidence" in the *Robinson* case, and that the District Court, in following

the *Robinson* decision, judged the sufficiency of the evidence by some lesser standard.

We are of the opinion that the District Court followed the "substantial evidence" standard, and, further, that the opinion of the Arkansas Supreme Court did not depart from the rule of requiring "substantial evidence" in the *Robinson* case, supra, and has not since changed the rule. *Superior Forwarding Co.* v. *Garner, supra.*

Appellant contends that the evidence is not competent to prove the fact of legal damages, the amount of damages, nor does the evidence show that the cause of plaintiff's injuries lay in the false reports.

Appellant argues that the testimony showing the financial posture of plaintiff is not competent to prove damages caused by the false reports. Appellant's contentions, however, must be rejected in light of the *Robinson* case, supra. From the evidence, the jury could reasonably conclude that the plaintiff lost customers who were subscribers of defendant's reports and that two others, namely Shinault and Lumberman's, had to go elsewhere for their needs on account of the effect of the reports on suppliers of raw materials (loss of credit).

Appellant further contends that measured by the standards set forth in *Robinson*, supra, the facts in the case at bar do not constitute a basis upon which a jury could find malice. The applicable standard, as stated in the *Robinson* case, is that plaintiff need not show malice on the part of the defendant in the moral sense (hate, vindictiveness, animosity), but need only show the doing of an act without just cause or excuse, which is in reckless disregard as to its results upon the rights of others. We think that there was sufficient evidence of "conscious indifference" for the district court to properly submit this issue and the matter of punitive damages to the jury. The most significant evidence reveals that there was no review by anyone having authority in appellant's organization. The report of Mrs. Morgan just came into the Little Rock office, went to the typist, and then went out automatically about a week later to the subscribers.

Appellant further contends that the submission of the issue of excessive publication to the jury was error. Plaintiff contends that the submission was not error, but if it was, then it was not prejudicial. Appellant concedes that it is not entitled to reversal and dismissal if the evidence is sufficient to support a finding of either malice or excessive publication. A jury finding in favor of plaintiff on either of those issues would, therefore, destroy the protection of appellant's conditional privilege.

The jury returned a general verdict. Therefore, there is no way to tell whether the jury found excessive publication or not. Certainly the jury did find malice (awarded punitive damages) and, as discussed earlier, there was substantial evidence of malice. Due to these facts we are of the opinion that the matter of whether or not there was sufficient evidence of excessive publication is immaterial, moot, and certainly not prejudicial.

We are of the opinion that there was no error committed in submitting the issues of future damages to the jury and that the verdict is not excessive. *Robinson,* supra.

The appellant further contends the excluded answer of the witness to Cross-Interrogatory No. 8 (a hypothetical question) prevented proof that Bagnal's company would have denied credit to plaintiff had Bagnal only been furnished by the appellant the true part of the first report. Interrogatory No. 8 is not so limited. While it is true that it limits the information furnished by the appellant to the true part of the report, it does not exclude the false information in the report from Bagnal before making a decision, but merely provides it be obtained elsewhere. We quote the applicable part of the question:

> "* * * and you had before you the same credit information from sources other than Dun & Bradstreet that was before you when considering the orders * * *?"

The trial court properly excluded such a question and answer thereto. The answer to this question does not prove what the appellant contends. Further, the District

Court has broad discretion in determining the extent of cross-examination, and there was no abuse of discretion in this case. *Ackelson* v. *Brown*, 264 F.2d 543.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[340 F.2d 882 (1965)]

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 17,421. SEPTEMBER TERM, 1964.

DUN & BRADSTREET, INC., Appellant,

vs.

G. L. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.

Appeal from the United States District Court for the Eastern District of Arkansas.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

February 3, 1965.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS,

FOR THE EIGHTH CIRCUIT.

No. 17421—SEPTEMBER TERM, 1964.

DUN & BRADSTREET, INC., Appellant, *vs.* G. L. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.	Appeal from the United States District Court for the Eastern District of Arkansas.

Petition of appellant for rehearing having been considered in this cause, It is now here Ordered by this Court that the same be, and it is hereby, denied.

March 16, 1965.

Opinion of the Honorable J. Smith Henley, United States District Judge.

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

FORDYCE WOOD PRODUCTS, INC., Plaintiff, *vs.* DUN & BRADSTREET, INC., Defendant.	No. PB-61-C-6

This is a libel action which was tried to a jury and resulted in a verdict in favor of plaintiff, Fordyce Wood Products, Inc., and against the defendant, Dun & Bradstreet, Inc., in the sum of $40,000 actual damages and in the further sum of $10,000 punitive damages. The cause is now before the Court on defendant's motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. The motions have been submitted on the record in the case, written briefs and oral argument.

The background facts in the case are substantially without dispute and are as follows:

Plaintiff, hereinafter at times called Fordyce, is an Arkansas corporation located in the city of Fordyce, Arkansas, and engaged in the business of the manufacture and sale of lumber and wood products. Since 1955 plaintiff's president has been Mr. J. P. Stucker. Plaintiff purchases much of the materials used in its manufacturing operations on credit, and its ability to obtain credit from suppliers obviously depends upon its credit rating and reputation.

In addition that rating and reputation has a bearing upon plaintiff's ability to secure contracts from purchasers for the future manufacture and delivery of products. Due to shortages of cash and working capital, at all times here pertinent plaintiff's financial position concededly was insecure.

The defendant, hereinafter at times called simply Dun & Bradstreet, is a nationally known financial rating and reporting concern [871] and renders such services to its subscribers for compensation. Dun & Bradstreet maintains an office in the City of Little Rock, Arkansas, and has individual correspondents scattered throughout the State whose function it is to obtain and transmit to the Little Rock office from time to time information relative to suits, judgments, and liens appearing on the official records of the counties wherein the correspondents reside. The information which these correspondents glean from the records is transmitted to Little Rock where it is appraised, formulated into reports, and disseminated to subscribers as the occasion arises. It does not appear that the local correspondents are given any special training or instructions as to what they are to do, or that any particular care is used in their selection in the first instance.

The information collected by the correspondents is transmitted to defendant's Little Rock office on printed forms furnished by defendant. Those forms are printed on both sides, one side being called the "Court Side," and the other being called the "Record Side." On the Court Side of the forms are blank spaces for the insertion of information relative to suits, judgments, and executions. On the Record Side are spaces for the insertion of information relative to real estate and chattel mortgages, deeds, leases, and bulk sales notices.

Somewhat strangely, the printed forms have no spaces for the insertion of notices of statutory liens, as such. For example, no specific spaces are alloted for information relative to laborers' or mechanics' liens or to federal tax liens, although the filing of notices of such liens is

common in Arkansas as elsewhere, and, of course, such liens have a distinct bearing on the credit and solvency of the persons or corporations subject to the liens.

On and prior to November 28, 1960, Fordyce was indebted to the United States on account of income taxes withheld from employees wages for the first and second quarters of 1960, and on November 28 [872] the Government caused to be filed of record in the office of the Circuit Clerk of Dallas County, where Fordyce is located, a general notice of a federal tax lien reciting the Government's claim. On December 1, 1960, Fordyce discharged the lien in full and it was marked satisfied of record.

The notice of lien was filed during the morning hours of November 28, and later on the same day Dun & Bradstreet's local correspondent, a Mrs. Morgan, found the notice of lien in the course of her examination of the records. While she was in the Clerk's office she heard one of the deputy clerks say to some other individual that the internal revenue agent who had filed the notice of lien had said upon leaving the Clerk's office that he was going to the bank and put a lien on the bank account.

In reporting this filing to Dun & Bradstreet Mrs. Morgan chose to use the Court Side of the printed form. In making the report she showed the United States as plaintiff and Fordyce as defendant. In the blank which called for identification of the Court in which the proceeding was pending she inserted the words "lien record." And she then went on to show that the claim was for withholding taxes for the first and second quarters of 1960. Still further, she went on to indicate that a separate lien had been filed against the bank account of Fordyce.

At this time there were a number of Dun & Bradstreet suppliers and prospective suppliers who were interested in the financial status of Fordyce, and on December 6, 1960, Dun & Bradstreet sent out a report based upon Mrs. Morgan's report just mentioned. The data which Mrs. Morgan transmitted to Little Rock emerged from the Little Rock office in the following form:

"FOLLOWING INFORMATION TAKEN FROM LIEN RECORDS . . . Suit styled U.S.A. *vs.* Fordyce Wood Products, Inc., filed Nov. 28, 1960 cause of action, withhold tax for 1st and 2nd quarter of 1960. Lien filed; also, lien filed on bank of subject by U.S.A. 12-6-60 (PR 51)."

[873] As a matter of fact, the Government had filed no suit against Fordyce and there was no specific lien filed against the Fordyce bank account, although, of course, the bank account was subject to the general lien, notice of which had been filed on November 28. Further, by December 6, the lien had been satisfied in full. Prior to disseminating the notice Dun & Bradstreet made no effort to determine whether the lien had been satisfied since it is not the custom of Dun & Bradstreet to keep up currently with satisfactions of encumbrances, and it makes no investigations with respect to such satisfactions except once a year when the status of all the subjects of its investigations is given an overall review. These annual investigations are not made by the same people who send in the original reports, but by other Dun & Bradstreet employees who work directly out of the Little Rock office.

Fordyce was not inquired of by Dun & Bradstreet prior to the dissemination of the December 6, 1960, report and did not learn of its existence until March, 1961, when Mr. Stucker by accident learned that the report had been sent out and also learned its contents.

Stucker or someone in his behalf immediately communicated with the Little Rock office of the defendant and advised it of the true state of affairs, including the fact that the lien had been satisfied on December 1. Defendant then sent out the following report:

"Further investigation reveals tax lien filed by U.S.A. vs. Fordyce Wood Products, Inc., on Nov. 28, 1960, was satisfied and released of record, Dec. 1, 1960. It is further understood that lien on bank account has also been satisfied. 3-6-61 (066c-9)."

It will be observed that this March report, although it did not refer to any suit, did not admit the existence of any error in the December, 1960, report, and it also again referred to a specific lien on the bank account whereas, as pointed out, there never was any such lien.

It is the theory of plaintiff that the December 6, 1960, report was false and defamatory and that it damaged plaintiff heavily in [874] its business and reputation, and that this damage was enhanced rather than mitigated by the March, 1961, report. It is also the theory of plaintiff that the acts of Dun & Bradstreet in disseminating the reports in question were characterized by "malice," and that defendant is liable for both actual and punitive damages.

As to the falsity of the report of December 6, 1960, it was contended by plaintiff at the trial that the report was false in three respects, namely, that it referred to a non-existent lawsuit, that it referred to a non-existent specific lien on the bank account, and that it failed to reflect the satisfaction of the lien on December 1, 1960. The March, 1961, report was contended to be false in that it again referred to the specific lien on the bank account.

It is the position of the defendant that the reports in question were substantially, if not literally, true, that they were not defamatory, and that they were not damaging. Further, defendant contends that the dissimenation of the reports was conditionally privileged, that the acts of defendant's employees were not malicious, and that defendant is not liable for any damages resulting from the dissemination of the reports even if they were false or inaccurate.

In answer to the claim of privilege plaintiff reiterates its contention that the dissemination of the reports was malicious in the impersonal sense recognized by the Supreme Court of Arkansas in the case of Dun & Bradstreet v. Robinson, 233 Ark. , 345 S. W. 2d 34. Plaintiff claims also that any conditional or qualified privilege which may have appertained to the reports originally was abused and lost by excessive publication, in that the reports were disseminated to persons who had not requested

them and who had no interest in the subject matter of the reports.

At the close of plaintiff's case the defendant moved for a directed verdict, and ruling on the motion was reserved. The motion was renewed at the close of all of the testimony and ruling was again reserved and the case submitted to the jury.

[875] There was and is very little dispute as to the underlying principles of law governing the case, and those principles were incorporated in the charge given to the jury. The jury was told, in substance, that the burden was upon the plaintiff to prove by a preponderance of the evidence that one or both of the reports was or were false and was or were defamatory and damaging,[1] and that if the jury did so find, its verdict would be for plaintiff unless it found for the defendant on its claim of privilege.

As to privilege, the jury was told that as a matter of law the dissemination of the reports was conditionally privileged, and that even though the jury might find that the reports were false, defamatory, and damaging, still the verdict must be for the defendant unless it appeared from a preponderance of the evidence that the dissemination of one or both of the reports was malicious, or unless it appeared with a like degree of certainty that the qualified privilege had been abused by an excessive publication of either or both of the reports. The jury was instructed still further that the burden of proving by a preponderance of

[1] The case was tried upon the theory that it was incumbent upon plaintiff to prove that as a result of one or both of the reports plaintiff had sustained some actual special damage. Plaintiff made no contention that it was entitled to general compensatory damages in the absence of proof of special damage. That proof of special damage is necessary in order to justify a recovery on account of a report similar to those involved here seems to have been the view taken by the Court in Robinson, supra. Cf. Restatement, Torts, §§569 et seq.; 1 Harper & James, The Law of Torts, §5.9; and the early Arkansas case of Obaugh v. Finn, 4 Ark. 110, to the effect that unlike slanders, which may be either "slanders per se" or "slanders per quod," all libels are "libels per se" and justify a recovery of substantial compensatory damages without proof of any specific actual damage.

the evidence that the privilege had been lost by the presence of malice on the part of defendant or by excessive publication was upon the plaintiff.

The jury was likewise instructed as to malice and excessive publication in terms to which defendant did not object. As a matter of fact, the defendant did not object to any of the language of the charge, as language, or as failing in the abstract to state the law correctly. The defendant did object vigorously to certain [876] portions of the instructions as not being applicable to the facts or not justified by the evidence.

In connection with the falsity of the reports, the jury was instructed that as a matter of law the first report was false in that it referred to a lawsuit which had never existed and that it referred to a specific lien on plaintiff's bank account whereas there had never been any such specific lien. And the jury was told also that the second report was false as a matter of law in that it again referred to the non-existent specific lien on the bank account. The Court refused to instruct that the first report was false in that it failed to show the satisfaction of the lien prior to the dissemination of the report, the Court taking the view that while this omission might render the report incomplete it would not of itself make the report false.

All questions as to the defamatory nature of the reports, damages, both actual and punitive, privilege, and excessive publication were left for determination by the jury. To the extent that it may appear necessary, references will be made herein to those portions of the charge.

I.

In support of its motion for judgment notwithstanding the verdict the defendant contends, ultimately, that the verdict is not supported by substantial evidence. To put it another way, defendant's ultimate contention is either that there is no substantial evidence that the reports in question were false, defamatory, and damaging, or that

the claim of privilege has been established as a matter of law, there being no substantial evidence of malice or abuse of the privilege by excessive publication. In evaluating this contention the Court is required to view the record in the case in the light most favorable to the plaintiff.

From its consideration the Court is convinced that the statements in question were false as a matter of law in the respects [877] mentioned to the jury. It is also convinced that on the evidence the jury was justified in finding that the statements were defamatory,[2] and that their false and defamatory nature was a proximate cause of actual financial damage to plaintiff.

With regard to malice and excessive publication, defendant concedes that as far as its motion for judgment notwithstanding the verdict is concerned, substantial evidence of either malice or excessive publication would be sufficient to justify the jury in finding against the defendant on its claim of privilege. Since the Court is persuaded that there was substantial evidence from which the jury could have found malice,[3] and since it is clear from the

---

[2] The jury was told: "In order for a financial report dealing with the affairs of a corporation to be 'defamatory,' the report must have a meaning which tends to discredit the financial standing of the corporation in the community in which it does business or in the trade in which it is engaged, or which tends to prejudice it in the conduct of its trade or business, or to deter third persons from dealing with it, or to impute to the corporation insolvency, bankruptcy or want of credit. And this meaning must have been the one which the recipients of the report either correctly, or mistakenly but reasonably, understood that the report was intended to express. In determining whether the reports here involved were defamatory, you should consider them in their entirety and as they relate to each other; and the words contained in the reports should be given their plain, natural and commonly accepted meanings."

[3] "Malice" was defined to the jury in the language used by the Court in the Robinson case, supra. The jury was told:

"'Malice', as I have used the term, means the doing of a wrongful act, either in a personal sense, as the doing of an act intentionally that is wrong, or the doing of an act actuated by spite, grudge, hatred, ill will or evil intent, or in the impersonal sense, such as the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights of others as to constitute ill will.

fact that punitive damages were awarded that malice was found, it is unnecessary at this point to consider whether there was substantial evidence of excessive publication. That question will be considered in connection with defendant's alternative motion for a new [878] trial.

While defendant discusses the question of the falsity of the statements in connection with its motion for a new trial rather than in connection with its motion for judgment notwithstanding the verdict, the Court prefers to take up that question at this point in the opinion.[4]

It is the position of the defendant that the "gist" or "sting" of the reports was that plaintiff was having tax difficulties with the Government and that a notice of tax lien had been filed against plaintiff, and that this was true, and that the statements taken as a whole were substantially true, or that at least it was for the jury to say whether the statements were true or false. The Court cannot accept this argument.

In the Court's view a statement that the Government has filed a lawsuit against a taxpayer, a most unusual collection procedure, cannot reasonably be equated with a statement that the Government has merely filed a notice of lien. Nor, in the Court's estimation, can reasonable men differ with respect to the truth or falsity of statements which indicate the existence of a specific lien against a taxpayer's bank account when no such specific lien existed.

"I might say, Members of the Jury, that the plaintiff does not contend in this case that the defendant acted with malice in the personal sense just outlined, but it does contend that the defendant acted with malice in the impersonal sense, that is to say that the publications of the statements as published were without just cause or excuse, and were characterized by such a conscious indifference or reckless disregard as to their results or effects upon the rights of plaintiff as to constitute ill will."

[4] In a pre-trial motion for summary judgment defendant took the position that as a matter of law the statements were substantially true. That motion was overruled, and, as stated, the jury was instructed ultimately that the statements were false as a matter of law.

It must be remembered that the truth of a statement is one thing; whether a statement is defamatory or damaging is another question, and the statements here involved were simply not true either literally or substantially.

As has been said, the question of the defamatory nature of the statements was left to the jury, and the jury could have found the statements defamatory in the sense that they implied that plaintiff was having more than ordinary tax problems, and that the Government had found it necessary not only to file a general notice of [879] lien, but also to take specific action relative to plaintiff's bank account, and to file a lawsuit against plaintiff. Certainly a jury might consider that such statements would be more damaging to plaintiff than a mere statement that a single notice of lien had been filed.

On the matter of damages defendant argues that the evidence was insufficient to establish either the fact of legal damage or the amount of legal damages sustained, and that such insufficiency in either respect would entitle defendant to a judgment notwithstanding the verdict. In considering this argument the Court will say at the outset that it does not agree with defendant that in order to prevail ultimately plaintiff was required to establish the amount of its actual damages in terms of dollars and cents. It is sufficient if plaintiff has established by a preponderance of the evidence that it has sustained actual damages in some substantial amount.

In the course of the trial much evidence was produced on the question of whether the false and defamatory nature of the statements had actually damaged Fordyce in its business, credit, or reputation. It would prolong this opinion unduly to undertake to abstract or analyze this evidence in detail. Suffice it to say that in the Court's view there was substantial evidence from which the jury could find that as a proximate result of the falsity and defamatory nature of one or both of the statements plaintiff sustained actual damage in a substantial amount. Questions as to the amount of actual damages awarded by the jury,

and as to the alleged excessiveness of the verdict, will be discussed in connection with the motion for a new trial.

The question of whether the evidence justified the finding of malice implicit in the jury's verdict must, of course, be decided by reference to Arkansas law. In Dun & Bradstreet v. Robinson, supra, the Supreme Court of Arkansas adopted a broad concept [880] of malice in cases involving a claim of conditional privilege advanced by a financial reporting agency. Robinson was a produce dealer engaged in business at Springdale, Arkansas. In the course of her investigation of another concern the local correspondent of Dun & Bradstreet heard a rumor that Robinson had gone out of business and pursuant to instructions reported this rumor to Dun & Bradstreet's Little Rock office. Without making any effort to check the truth of the report Dun & Bradstreet mailed to 36 of its subscribers a report as follows: "It is currently reported subject discontinued operations February 26, 1958. Further investigation is underway for more complete details." This report was sent out on March 3, 1958. After notifying the Little Rock office of the rumor, the local correspondent talked with Robinson's secretary who denied the truth of the rumor, and the local correspondent advised the Little Rock office of the denial. On March 4, the Little Rock office advised its subscribers that Robinson "was interviewed recently and he denied reports that operation discontinued, or that he has sustained any business reverses." Thereafter, Robinson sued Dun & Bradstreet and recovered judgment for $30,000 actual damages. The Supreme Court of Arkansas affirmed the Circuit Court, rejecting appellant's contentions that the reports were true, that they were privileged, and that there was no substantial evidence of damage.

In discussing the question of privilege the Court declined to adopt appellant's argument that it was incumbent upon the plaintiff to show "actual malice," i.e. ill-will, spite, or a grudge against plaintiff on the part of Dun & Bradstreet, and held it sufficient for plaintiff to show malice in an "impersonal sense," that is to say it was suffi-

cient if plaintiff had shown that the publications complained of were disseminated with a reckless disregard of the rights of others amounting to illwill. The Court then held that there was substantial evidence to sustain the jury's findings of impersonal or constructive malice. It was said in that connection [881] (pp. 39-40 of 345 S.W. 2d):

> "* * * Dun & Bradstreet enjoys the implicit confidence of its subscribers, as attested by witnesses in the cause before us. This confidence in the accuracy of Dun & Bradstreet reports places an even greater responsibility upon the company, and requires that its reports be compiled with regard to the effect that such report may have upon the rights or feelings of the person reported on, if it should develop that such information given is false. In applying the law given by the court in its instruction heretofore quoted, we look to the evidence to determine whether a jury question was presented. Clearly, we think the answer is 'Yes.' It would have been an easy matter for Mrs. Lawrence to have called Robinson on February 27th before communicating the rumor to the Dun & Bradstreet offices in Little Rock; in fact, Mrs. Lawrence did call Robinson's office the next day. Likewise, though the Little Rock office asked Mrs. Lawrence on February 28th for additional information, the special report to subscribers was mailed out from Little Rock before receiving Mrs. Lawrence's response to this request; at that, it was not sent until Monday, March 3rd, four days after receiving her telephone call. This four day period between the receipt and dissemination of this information certainly indicates that the company did not consider the report so startling and important that there was a pressing need for immediate communication to subscribers, and it seems that prudence would have dictated that the company await further clarification, particularly since the information was obtained from an inexpe-

> rienced operator. By waiting one more day, the company would not have found it necessary to send out the second report. We hold there was substantial evidence to the effect that Mrs. Lawrence and Dun & Bradstreet acted with conscious indifference and reckless disregard of the rights of Robinson in publishing the report of March 3rd; it follows that the protection afforded by the fact that the communication was conditionally privileged, was lost."

Naturally, there are differences between the facts in the instant case and the facts in Robinson, but in the Court's eyes the acts of defendant in this case were just as blameworthy as its acts in the Robinson case, and the jury was as much justified in finding constructive malice here as the jury was in that case.

The report which Mrs. Morgan mailed to the defendant's Little Rock office, referring as it did to the United States as plaintiff and Fordyce as defendant, while at the same time saying that the Court in which the proceeding was pending was the "lien record," and referring to a specific lien on the bank account of Fordyce, should have been recognized as unusual by any person having even an ordinary familiarity with federal tax collection procedures, such as employees of defendant's Little Rock office might reasonably be expected to have. The slightest inquiry would have revealed [882] that there was no lawsuit, and that no specific action had been taken with respect to the bank account of plaintiff. Such inquiry was not made. Nor was the March 6, 1961, report in any sense a full and frank confession that the first report had been in error in any respect, and there was a repetition of the reference to a specific lien on the bank account. While there is nothing to indicate that defendant's treatment of plaintiff was different from that which might have been accorded to any other subject of investigation in the same or similar circumstances, the Court thinks that the jury was justified in concluding that Dun & Bradstreet sent out its reports of adverse information with a reckless disregard of the truth

or falsity of those reports and of the effect which they may have on the plaintiff.

From what has been said it follows that the motion for judgment notwithstanding the verdict will be denied.

II.

As is not unusual with post-trial motions, defendant's motion for judgment notwithstanding the verdict and its alternative motion for a new trial overlap to some extent. Contentions disposed of in connection with the principal motion will not be discussed in connection with the alternative motion.

The most serious questions raised by the motion for a new trial relate to the sufficiency of the evidence to justify the submission to the jury of the issue of abuse of privilege by excessive publication, to the sufficiency of the evidence to sustain the dollars and cents award of actual damages, and to the alleged excessiveness of the verdict.

In passing upon these questions it is well to keep in mind that the granting or denying of a motion for a new trial rests within the sound discretion of the Court. Chicago & N. W. Ry. v. Britten, 8 Cir., 301 F. 2d 400; Tsai v. Rosenthal, 8 Cir., 297 F. 2d 614; Gallon v. Lloyd-Thomas Co., 8 Cir., 261 F. 2d 26. And [883] a new trial will not be granted to correct an insubstantial or harmless error. Stanczak v. Pennsylvania R. Co., 7 Cir., 174 F. 2d 43; Freid v. McGrath, C.A. D.C., 133 F. 2d 350; Crockett v. Boysen, D.C. Minn., 26 F.R.D. 148. As was said in Duke v. St. Louis, S.F. R. Co., C.C. Ark., 172 Fed. 684, 686, a new trial will not be granted "unless it is reasonably clear that prejudicial error has crept into the record," and that the courts are always reluctant to grant new trials when "convinced that the verdict is in favor of the right party."

The evidence in support of plaintiff's claim of excessive publication of the reports was weak and was largely circumstantial in nature. There was direct testimony from only one witness that he received the December 6 report when he had not asked for any report on plaintiff, and that

testimony was not entirely satisfactory. However, as stated, the plaintiff is entitled to have whatever evidence there was viewed in the light favorable to it and to have the benefit of all inferences in its favor which may be deduced rationally from the evidence, and the Court is not prepared to say that plaintiff's evidence of excessive publication was so weak as to be insubstantial.

But even if the Court is wrong in that connection, nevertheless the Court is persuaded that the error, if any, in submitting that issue to the jury was not prejudicial. The evidence was weak, and it is to be doubted that the jury in fact found any excessive publication, although of course, the Court cannot say affirmatively that there was no such finding. It is clear that there was substantial evidence of malice and there was a finding of malice. Such evidence and finding were sufficient to justify an award in plaintiff's favor irrespective of excessive publication, and the Court does not believe that the question of excessive publication had any substantial effect on the result of the case or on the size of the verdict.

[884] As to the question of whether the evidence sustained the amount of actual damages awarded to plaintiff, the jury was instructed that if it found for the plaintiff it should award as actual damages such sum as the evidence might show would fairly and reasonably compensate the plaintiff for the actual damages sustained by plaintiff up to the time of trial and such, if any, as the evidence might show with reasonable certainty plaintiff would sustain in the future resulting from the falsity and from the defamatory nature, if any, of the respective reports. The jury was also told that its award of actual damages must be reasonable, that it must be based upon evidence and not upon speculation or conjecture, that actual damages incurred up to the time of trial might be shown by a preponderance of the evidence, but that future damages must be shown by the evidence with a reasonable degree of certainty. The jury was also instructed that plaintiff was not required to show its actual damages with mathematical exactitude, but that it was required to show such damages as a matter of fair and rea-

sonable estimate based upon the evidence. The jury was then instructed:

> "In measuring plaintiff's actual damages, if you measure them, you should take into consideration the evidence produced by the respective parties bearing upon plaintiff's claimed loss of credit, loss of business and customers, loss of business reputation and good will, and loss of profits, alleged to be attributable to the falsity of the statements and the alleged defamatory nature thereof, and give to all of that evidence the weight which you think it should have in determining the amount of actual damages, if any, that should be awarded plaintiff."

Again without going into detail, the Court is satisfied that there was substantial evidence that plaintiff had sustained up to the time of trial and would sustain in the future damages to its credit, business, reputation, and good will, and that it had sustained and would sustain losses of profits. While the sum of $50,000 awarded by way of actual damages is large, and, indeed, is considerably larger than the Court would have awarded, it cannot be said that the sum arrived at by the jury is not sustained by the [885] evidence when viewed in the light most favorable to the plaintiff.

It is true that plaintiff's evidence as to actual damages was general and rather indefinite, but it does not appear to the Court to differ qualitatively from the evidence which the Supreme Court of Arkansas held in *Robinson*, supra, to be sufficient to sustain the verdict arrived at in that case. The elements of actual damage which the jury was permitted to consider in this case were essentially the same elements which the jury was permitted to consider in *Robinson*, and the instructions as to actual damages conformed to the law as expressed in *Robinson*.

With respect to the alleged excessiveness of the verdict, the award of $10,000 as punitive damages gives the Court

no concern. The award of $40,000 as actual damages is a large one and is larger than the Court would have voted for had it been a member of the jury or would have awarded had the case been tried to the Court. But again viewing the evidence in the light most favorable to plaintiff, the Court is unwilling to say that the verdict is monstrous, shocking, or outrageous or outside the bounds of the testimony. There was certainly nothing in the case to inflame the passions or prejudices of the jurors, and during the week long trial none of the capable attorneys for the respective parties undertook to inject any passion into the case. While the size of the verdict for actual damages gives the Court concern, the Court does not feel justified in disturbing it.

One other matter is to be mentioned. Defendant assigns as prejudicial error the action of the Court in excluding one question and answer appearing in the deposition of L. N. Bagnel, which deposition was taken on interrogatories and cross interrogatories. The question excluded was:

> "If the (December 6, 1960 report) had stated only that a tax lien had been filed by the Federal Government on November 28, 1960, against Fordyce Wood Products, and you had before you the same credit information from sources other than Dun & Bradstreet that was before you when considering the orders [886] reflected by Exhibit 'A' and 'B', would your decision as to accepting the orders been any different?"

The excluded answer was "No."

The question was in poor form, it dealt with a purely hypothetical situation, and it was propounded in connection with defendant's trial theory that plaintiff would have suffered as much from a true report of the filing of the tax lien as it did from the December 6, 1960, report as written and, therefore, could not complain of the contents of that report. The Court held at the time and now holds that the question was not whether plaintiff would have

been damaged by a true report, but whether it was damaged by the false reports which were sent out, and is of the opinion that the exclusion of the question and answer just discussed was proper. In any event, the Court does not feel that the exclusion of this one question and this one answer had any prejudicial effect on defendant.

Both the principal and alternative motions will be denied, and judgment on the verdict will be entered.

Dated this 24 day of June, 1963.

/s/ J. Smith Henley,
United States District Judge.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 3 1965
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 231

DUN & BRADSTREET, INC.

Petitioner,

against

G. L. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

D. D. PANICH
Boyle Building
Little Rock, Arkansas 72201
Counsel for Respondent.

HENRY W. GREGORY, JR.
H. MURRAY CLAYCOMB
Simmons National Building
Pine Bluff, Arkansas 71601
Of Counsel.

PIONEER

INDEX

	Page
Table of Cases	ii
Additional Statement of the Case	1
Reasons Why Certiorari Should be Denied	5
Argument for Denying the Writ	
Absence of Jurisdiction	6
The Libel is Not Within the Area of Constitutionally Protected Speech	8
The Instructions on Falsity of Reports Were Correct, and Malice Was Proved	14
Conclusion	18

TABLE OF CASES

Page

Beauharnais v. *Illinois*, 343 U. S. 250, 96 L. ed. 919, 72 S. Ct. 725 ..... 11, 12

Chaplinsky v. *New Hampshire*, 315 U. S. 568, 86 L. ed. 1031, 67 S. Ct. 766 12

Cox v. *Louisiana*, 379 U. S. 536, 13 L. ed. 2d 471, 85 S. Ct. 453 10

Dewey v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 S. Ct. 379 7

Dun & Bradstreet v. *Robinson*, 233 Ark. 168, 345 S. W. 2d 34 ..... 6, 13

Faulk v. *Aware, Inc.*, 244 N. Y. S. 2d 259, aff'd 200 N. E. 2d 778, 202 N. E. 2d 372, Cert. den., 380 U. S. 916 (Mar. 1, 1965) Reh. den. (April 6, 1965) 13

Garrison v. *Louisiana*, 379 U. S. 64, 13 L. ed. 2d 125, 85 S. Ct. 209 ..... 8, 10

Griffin v. *California*, ... U. S. ....., 14 L. ed. 2d 106, 85 S. Ct. 1229 (April 28, 1965) 6, 8

Hormel v. *Helvering*, 312 U. S. 552, 85 L. ed. 1037, 61 S. Ct. 719 (1941) 7

In Re George F. Nord Bldg. Corp.
Kausal v. *George F. Nord Building Corp.*, (Ill.) Ct. of App. 7th Cir., 129 F. 2d 173, Cert. Den. 317 U. S. 670, 87 L. ed. 538 9

Konigsberg v. *State Bar of California*, 366 U. S. 36, 6 L. ed. 2d 105, 81 S. Ct. 997 12

Lamont v. *Postmaster General*, No. 491, Opinion of May 24, 1965, ... U. S. ....., 14 L. ed. 2d 398 10

Table of Cases (Cont'd)

	Page
McGoldrick v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 84 L. ed. 849, 60 S. Ct. 670	7
New York Times v. *Sullivan*, 376 U. S. 254, 11 L. ed. 2d 686, 84 S. Ct. 710 (Mar. 9, 1964)	9, 10
Pierce Oil Corp. v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. ed. 855, 42 S. Ct. 440	9
U. S. v. *Oregon Lumber Co.*, 260 U. S. 290, 67 L. ed. 261, 43 S. Ct. 100	9
Valentine v. *Chrestensen*, 316 U. S. 52, 86 L. ed. 1262, 62 S. Ct. 920 (1942)	9

COURT RULES

Rule 19 1(b), Supreme Court Rules 5, 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 231

DUN & BRADSTREET, INC.

Petitioner,

against

G. L. NICKLAUS, Trustee in Bankruptcy for FORDYCE WOOD PRODUCTS, INC.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ADDITIONAL STATEMENT

By pre-trial stipulation, the original parties agreed to the actual facts of the matters referred to in Petitioner's reports involved in this case. The stipulation first reflected the fact of the filing of a federal tax lien in the office of the Circuit Clerk on November 28, 1960, and of its satisfaction on December 1, 1960, and then set out the following agreement of the parties (R. 17):

> "No complaint was filed in any court nor was there any lien filed separately or specifically against the plaintiff's bank account."

These provisions of the pre-trial stipulation were read to the jury by Plaintiff at the outset of the trial (R. 23).

On the burden of proof, the Trial Court instructed the jury that the burden was on the Plaintiff, among other things, to establish by a preponderance of the evidence:

"that one or both of the reports or statements referred to in the evidence was or were false." (R. 535)

The Trial Court then gave that part of the charge relating to the falsity of the reports quoted in Petitioner's Statement (Petition 6). The remainder of the instruction on falsity not quoted by Petitioner, was:

"I think that I should tell you in this connection that the falsity of the report of December 6 lay in the fact that it advised its recipients that a suit had been filed by the United States against plaintiff, that a federal tax lien had been filed against plaintiff, and, further, that an additional lien had been filed against plaintiff's bank account. Now, while it is true that on November 28, 1960, the Government filed a notice of an internal revenue tax lien against plaintiff with the Circuit Clerk of Dallas County, Arkansas, there was never any suit filed against the plaintiff by the Government, and there was never any specific lien filed against the bank account, although, of course, the general notice of lien affected the bank account as well as plaintiff's other assets.

"The second statement was false in that it referred again to a specific lien against the bank account whereas there was never any such specific lien.

"Of course, the mere fact that the statements were false is not alone sufficient to justify you in returning a verdict for the plaintiff. As I have stated, you must further find that the statements, or at least one of them, was or were defamatory, and that the falsity and the defamatory nature, if any, of the statement or statements was a proximate cause of damage to the plaintiff; and the burden is on the plaintiff to estab-

lish the defamatory nature of the statements and damage resulting therefrom by a preponderance of the evidence." (R. 535-36)

The tax lien filed on November 28, 1960, was in fact paid and satisfied of record on December 1, 1960, five days before the initial report of December 6, 1960 (Pl. Ex. 30, R. 24, 25), was published to at least fifty-one of Petitioner's subscribers (R. 17; 225-226). The fact of satisfaction of the lien was not disclosed by Petitioner to those subscribers until the report of March 6, 1961 (Pl. Ex. 33, R. 24, 25). Up to March 6, 1961, Petitioner continued to send the same December 6, 1960, report to other subscribers who for the first time had requested credit information on Plaintiff, but did not notify them that the lien had been satisfied (R. 114; R. 162-163).

It was Petitioner's policy not to make a search for and report on satisfactions of judgments and liens, except once every six months to a year, and forms sent out by Petitioner to its correspondents sought only the bad information on subjects (R. 81; 92; 100; 109-111).

Neither Mrs. Morgan, the Plaintiff's correspondent, nor anyone in Petitioner's Little Rock office tried to verify the second-hand information (Petition 4) about the lien against Plaintiff's bank account (R. 99; 111; 127-129; 133-134; 152-155). Petitioner's Little Rock office had no system for screening or reviewing the report before it was sent out to its subscribers (R. 115-116; 125; 153). Someone in the Little Rock office, in preparing the report to be distributed to subscribers, had supplemented the information sent in by Mrs. Morgan, by adding the statement: "Suit styled *U. S. A.* v. *Fordyce Wood Products, Inc.*, filed November 28, 1960, cause of action, * * * *" (Pl. Ex. 30, R. 24, 25; Pl. Ex. 29, R. 97-98; R. 107).

Before Petitioner's Little Rock office sent out the March 6, 1961 report, its Service Manager was notified

that there had never been any lien on the bank account (R. 140, 146). The Service Manager arranged for the preparation of the March 6, 1961 report (R. 125-126) and saw it before it was sent out (R. 133). This report repeated the reference to "lien on bank account":

> "It is further understood that lien on bank account has also been satisfied 3-6-61 (066C-9)." (Pl. Ex. 33, R-24—Petition, 6)

The Service Manager made no further investigation at that time regarding the lien on the bank account and knew of none that was made (R. 133-134).[1]

At no stage of the proceedings in the Trial Court did Petitioner raise the constitutional issue, or make any objection to the Court's instructions on constitutional grounds (R. 530, 532, 543-545).

Neither the Trial Court nor the Court of Appeals has made any decision in this case on the constitutional questions presented by this Petition (Appendix to Petition, 2 a — 10 a; 13 a — 30 a).

---

[1] In describing why no investigation was made, the Service Manager testified: (R. 133-134)

"A. Well, at that time we were not definitely sure whether there had been or not (lien on bank account) and the important factor anyway in our opinion was that the tax lien had been released and, as far as I was concerned, in my opinion, the lien on the bank account whether it had been or hadn't been was not of enough significance to worry about."

REASONS WHY CERTIORARI SHOULD BE DENIED

1. Petitioner has made no showing that the Court of Appeals has rendered a decision falling within the scope or purview of Rule 19 1(b) of this Court.

2. The constitutional issue was never raised by Petitioner, either during the trial or on the appeal, until it came before the Court of Appeals on Petition for Rehearing.

3. No "public official" and no "official conduct" are involved, and *New York Times* v. *Sullivan* has no application.

4. The case, being one of a purely private and commercial nature, does not present any matter of great and important public interest, and the libel committed here is not constitutionally protected.

5. Petitioner was not deprived of the defense of "substantial truth" and the matter of "burden of proof" to prove truth is immaterial, under the facts of this case.

6. In respect to malice, the case was tried under applicable state standards, which were substantially the same as laid down in *New York Times* v. *Sullivan*.

ARGUMENT FOR DENYING THE WRIT

Absence of Jurisdiction

Petitioner has not demonstrated that this case comes within any of the considerations governing review on certiorari, as set out in Rule 19 1(b) of this Court. The Court of Appeals has made no decision adjudicating the federal or constitutional question, unless it could be said that its order denying rehearing amounted to such an adjudication. Neither has it been shown that there is anything in the decision of the Court of Appeals which is in conflict with applicable decisions of this Court.

The case was tried in the traditional way and in accordance with accepted and recognized principles of the law of libel applicable in the state (Opinion of Court of Appeals, Appendix to Petition, 8 a). See also, *Dun & Bradstreet* v. *Robinson*, 233 Ark. 168, 345 S. W. 2d 34. Thus, there has not been such a departure from the accepted and usual course of judicial proceedings, by the affirmance of the judgment of the Trial Court, as to require the exercise of this Court's power of supervision.

The considerations for review under the Rules being lacking, and the libel committed here being of a commercial nature and involving only private citizens, there is no special or compelling reason why this Court should undertake a review of the case.

Although Petitioner concedes (Petition 2) that it did not raise the constitutional issue in a timely manner, it argues that this does not necessarily prevent review by this Court, by reason of the decision in *Griffin* v. *California*, 14 L. ed. 2d 106, 85 S. Ct. 1229 (April 28, 1965) and other authorities cited in its Footnote 3 (Petition 2). There is no showing that the results in this case would have been any different had *New York Times* v. *Sullivan*

been decided earlier and had been under consideration by the courts below.

Neither does it appear that Petitioner was necessarily precluded from acquainting the Court of Appeals with *New York Times* v. *Sullivan*. There was still a span of almost eleven months from the time *New York Times* was decided until the Court of Appeals rendered its decision on February 3, 1965.

The first two cases cited by Petitioner as supporting its claim that the Court can now consider the constitutional issue, though it was not raised in the courts below, were cases in which the Court refused to consider the new issue. Each of the other three cases involved a situation where the Court noted, that if the new issue were not considered, an injustice would otherwise result. The general rule on this subject is that an appellate court does not give consideration to issues not raised in the courts below, except "where the obvious result would be a plain miscarriage of justice." *Hormel* v. *Helvering*, 312 U. S. 552, 85 L. ed. 2d 1037, 61 S. Ct. 719.[2]

---

[2] In *Dewey* v. *Des Moines*, 173 U. S. 193, at 199, the Court said:

"• • • *It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. Hamilton Mfg. Company* v. *Massachusetts*, 6 Wall. 632.

"In order to be available in this court some claim or right must have been asserted in the court below by which it would appear *that the party asserting the right founded it to some degree upon the Constitution or laws or treaties of the United States.* • • •

"A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Company* v. *Massachusetts, supra.* A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it." (emphasis added)

In *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, at 434, it was said:

"But it is also the settled practice of this Court in the exercise of its appellate jurisdiction, *that it is only in exceptional cases*, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." (emphasis added)

It seems to be only in those exceptional cases where the outcome would have been different had a decision of this Court altering the former state of the law been known at the time of the trial, that this Court has considered issues not raised below. Such a case is *Griffin* v. *California*, 85 S. Ct. 1229 (April 28, 1965).

The rule of *New York Times* and of *Garrison* v. *Louisiana*, 13 L. ed. 2d 125, 85 S. Ct. 209, applies only to criticism of the official conduct of a public official. That rule has not been applied to matters of private libel. Since the outcome here would not appear to have been influenced by either of these decisions in their strict application, and since the instant case was tried under standards quite similar to those adopted by the Court in *New York Times*, as will be pointed out more in detail later, no reasonable ground is shown to justify the Court in treating this as one of those "exceptional" cases. Under the settled appellate practice of this Court, the Petition should be denied.

The Libel Is Not Within the Area of Constitutionally Protected Speech

Petitioner is a credit reporting agency, which, under contractual relations with some of its subscribers and for a fee, undertook to supply credit information to them concerning the Plaintiff, Fordyce Wood Products, Inc. The circulation of the reports involved here was limited in nature, and on the basis of that and of their commercial and confidential character, Petitioner claimed a qualified privilege (Answer, R. 14-16), which was granted by the Trial Court (R. 536-537).

Petitioner thus received the benefits of this defense at the trial. Its present claim to First Amendment freedom, which would afford an "absolute" privilege and the right to an unfettered publication of the reports, is inconsistent with the basis for its defense of qualified privilege—

i. e., the restricted and confidential circulation of the reports. By relying on the defense of qualified privilege, then, Petitioner has waived the constitutional issue. *Pierce Oil Corporation* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. ed. 855; *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 67 L. ed. 261; *Kausal* v. *George F. Nord Building Corp.*, (Ill. CA-7) 129 F. 2d 173, Cert. Den. 317 U. S. 670, 87 L. ed. 538.[3]

Actually, the contents of the reports were of little if any interest to anyone except those few of Petitioner's subscribers who for business or commercial reasons had requested and paid for that information. In this respect, the case bears considerable resemblance to *Valentine* v. *Chrestensen*, 316 U. S. 52, 86 L. ed. 1262, 62 S. Ct. 920 (1942), which was clearly distinguished in the Court's opinion in *New York Times* v. *Sullivan*.[4] In *Chrestensen*, the Court said:

---

[3] "Furthermore, the right of free speech guaranteed by the Constitution of the United States, Amendment 1, and the Constitution of Illinois * * * is not an absolute right. It is a relative right that may be modified in its interplay with the rights of others, and *it may be waived by the party for whose benefit it was intended.*" (Emphasis Supplied) *Kausal* v. *George F. Nord Bldg. Corp.*, 129 F. 2d 173, 176.

"There is nothing in the nature of such a constitutional right as is here asserted to prevent it being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right." *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. ed. 855.

[4] "The court in Chrestensen reaffirmed the constitutional protection for 'the freedom of communicating information and disseminating opinion'; its holding was based upon the factual conclusions that the handbill was 'purely commercial advertising' and that the protest against official action had been added only to evade the ordinance.

The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *New York Times* v. *Sullivan*, 376 U. S. 254, 265-266, 11 L. ed. 2d 686, 698.

"We were equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U. S. 52, 54, 86 L. ed. 1262, 1265.

The reports circulated by Petitioner were purely "commercial." They bore no social significance nor promoted any interchange of ideas, expression of opinion, or discussion on matters within the area heretofore recognized by this Court as that to which the First Amendment freedoms apply. *New York Times* v. *Sullivan*, 376 U. S. 254, 11 L. ed. 686, 84 S. Ct. 710; *Garrison* v. *Louisiana*, 379 U. S. 64, 13 L. ed. 2d 125, 85 S. Ct. 209 (April 28, 1965); *Cox* v. *Louisiana*, 379 U. S. 536, 13 L. ed. 2d 471, 85 S. Ct. 453; *Lamont* v. *Postmaster General*, No. 491, Opinion of May 24, 1965, ____ U. S. ____, 14 L. ed. 2d 398.

Petitioner now seeks to have the Court extend the principles of *New York Times* v. *Sullivan* to a libel which has no relation whatever to a public official, official conduct, or public affairs. To do so would seriously weaken the whole rationale of that decision,[5] and deny to private citizens injured by libelous utterances the traditional rights and remedies which have long been recognized in the law.

To extend the rule of New York Times to situations such as this would open the floodgate and, indeed, might amount to a tacit admission of the inability of juries and of all the lower courts, both state and federal, to settle

[5] In holding that the publication in New York Times qualified for constitutional protection, the Court said: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *Terminiello* v. *Chicago*, 337 U. S. 1, 4, 93 L. ed. 1131, 1134, 69 S. Ct. 894; *De Jonge* v. *Oregon*, 299 U. S. 353, 365, 81 L. ed. 278, 57 S. Ct. 255. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection." 376 U. S. 254, 270-271, 11 L. ed. 2d 686, 701.

questions of fact and determine their sufficiency, contrary to the Seventh Amendment.

That the Court should not extend the doctrine of New York Times to a case of this nature seems implicit in the explanation given by the Court in *New York Times* as to why it did not feel bound by its previous statements to the effect that the Constitution does not protect libelous publications. Footnote 6, 376 U. S. 268, 11 L. ed. 2d 699. It was pointed out that the Court in *Beauharnais* v. *Illinois*, 343 U. S. 250, 96 L. ed. 919, 72 S. Ct. 725, had reserved just such a question as was presented in New York Times, when it said, in Beauharnais:

> "* * * for 'public men, are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'" 376 U. S. 268, 11 L. ed. 2d 699.

To apply the rule of *New York Times* to this case would also enter the unprotected area envisioned by Mr. Justice Goldberg in his concurring opinion in *New York Times*, in which Mr. Justice Douglas joined, when it was stated:

> "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. *The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.* This, of course, cannot be said 'where public officials are concerned or where public

matters are involved . . .'' 376 U. S. 301-302, 11 L. ed. 2d 721 (emphasis added).

It would seem clear, then, that the former decisions of this Court that libelous publications are not protected by the Constitution[6] still stand, except as modified in *New York Times,* in circumstances involving criticism of the official conduct of a public official.

In fact, in *Beauharnais* the Court quoted the views of a unanimous Court in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 86 L. ed. 1031 as follows:

> ''It has been well observed that such utterances (libelous utterances) are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,'' 343 U. S. 250, 255-256, 96 L. ed. 919, 926.

The instant case is further distinguished from New York Times in respect to the concepts under which they were tried. In New York Times, the case was submitted to the jury under the theory that the statements were libelous per se, that legal injury was implied, that falsity and malice are presumed, and that general damages need not be proved but are presumed. 376 U. S. 262, 11 L. ed. 2d 696.

The case at bar was submitted to the jury on an entirely different theory and under standards similar to those adopted by the Court in New York Times. This was a case of libel per quod, and the burden was on the Plaintiff to prove by a preponderance of the evidence (1) the publi-

---

[6] *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 86 L. ed. 1031, 67 S. Ct. 766; *Beauharnais* v. *Illinois,* 343 U. S. 250, 96 L. ed. 919, 72 S. Ct. 725; *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 6 L. ed. 2d 105, 81 S. Ct. 997.

cations were false (the falsity being found by the Court as a matter of law from the stipulated facts); (2) that the falsity was defamatory to the Plaintiff; and (3) that the falsity and defamatory nature of the reports were the proximate cause of damage to the Plaintiff. (R. 535, 6) So, falsity, malice and damages were not presumed, as in *New York Times,* but had to be proven by evidence. Also, the Trial Court in the instant case had determined that Petitioner had a qualified privilege and that it would not be liable for its reports and any misinformation contained in them unless the privilege was abused, either by reason of malice or by excessive publication (R. 536-7).

The concept of malice under which this case was submitted to the jury was not unlike the standard adopted in *New York Times.*[7]

A similar concept of malice in the impersonal sense (as a basis for recovery of punitive damages) was involved in *Faulk* v. *Aware, Inc.,* 244 N. Y. S. 2d 259. There, the Appellate Division, after reducing the amount of recovery, affirmed a judgment for both compensatory and punitive

[7] In *New York Times,* this was said to be the "federal rule": "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S. 279-280, 11 L. ed. 2d 706.

The Court then held that the Alabama law permitting a presumption of malice in connection with general damages "is inconsistent with the federal rule." 376 U. S. 284, 11 L. ed. 2d 708-709.

Here, the Trial Judge defined malice in the impersonal sense "as the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights of others as to constitute ill will." (R. 537)

The Court of Appeals said (Appendix to Petition, 8 a): "The applicable standard, as stated in the Robinson case, is that Plaintiff • • • need only show the doing of an act without just cause or excuse, which is in reckless disregard as to its results upon the rights of others." See also *Dun & Bradstreet* v. *Robinson,* 233 Ark. 168, 345 S. W. 2d 34.

damages for libelous utterances against Faulk, a television artist and broadcaster. In *Faulk,* as in the instant case, there was no presumption of malice and damages, and proof of both was required. Nor was Faulk a public official, though, in a sense, he was a "public figure."

The New York Court of Appeals affirmed (200 N. E. 2d 778) and in a supplemental opinion, which did not change the result, it was shown that the Court had *New York Times* v. *Sullivan* before it. *Aware, Inc.* v. *Faulk,* 202 N. E. 2d 372.

Certiorari was denied by this Court. *Aware, Inc.* v. *Faulk,* 380 U. S. 916 (March 1, 1965, reh. den. April 6, 1965).

There is even less reason for bringing the libel of the instant case within the realm of constitutionally protected speech.

The Instructions on Falsity of Reports Were Correct, and Malice was Proved

Petitioner contends (Petition 10-11) that it was deprived of the defense of "substantial truth" by the Trial Court's instruction that the reports were false as a matter of law (R. 535-36). The argument as to the "gist" or "sting" of the reports appears to be the same as Petitioner made in the Court of Appeals. It is difficult now to equate this argument with *New York Times* or in any way with an abridgement of First Amendment freedoms.

As Respondent understands *New York Times* on this subject, the objection was that in Alabama all the essential elements to the plaintiff's case there were presumed, so that, in effect, the burden of establishing the traditional defense of truth was cast upon the defendant, and that it was next to impossible to carry that burden in the realm

of opinion, ideas, and political or social expression (376 U. S. at 271-3, 11 L. ed. 2d at 701, 2).

Nowhere in the Trial Court's instructions to the jury was the burden placed on Petitioner to prove truth (R. 532-42). On the contrary, there were no presumptions here as in *New York Times* and the burden was on Plaintiff to prove all the essential elements of its case, falsity, and that the false statements were defamatory and caused damage (R. 535). The Trial Court correctly ruled on the basis of the stipulation and undisputed facts (See Respondent's Statement) that the reports were false as a matter of law, and so instructed the jury.[8] But the Trial Court carefully pointed out in this instruction what part of the report was true and what parts were false, and limited the jury's consideration to the question whether the false parts were defamatory and caused damage (R. 535-36). Thus, the question whether the "gist or sting" of the reports lay in the true part or in the false parts was left to the jury.[9]

Under these instructions, Petitioner was free to persuade the jury that the "gist or sting" lay in the true part

---

[8] On this subject the Court of Appeals said:

"There was no question or issue as to whether these two parts of the reports were false as the parties stipulated to the following: 'No complaint was filed in any court, nor was there any lien filed separately or specifically against the plaintiff's bank account.' *Since there was no genuine issue of fact on the truth or falsity of the reports,* the court's instructions with respect to the reports were proper." (Appendix to Petition, 6a) (Emphasis supplied)

[9] The Court of Appeals said:

"Such a contention, however, fails to consider the fact that such considerations actually relate to the matter of whether the reports were defamatory, or if defamatory, were the proximate cause of plaintiff's damages. *These considerations were specifically left to the jury for their consideration by the court's instructions.* When the paragraph of the charge of which the appellant complains is read as a part of the whole charge, *and we further consider the stipulation of the parties with respect to the reports,* the instruction as given correctly stated the applicable law." (Appendix to Petition 6a-7a) (Emphasis supplied)

of the reports and that Plaintiff was damaged by this part, rather than by the false parts.

Because of the undisputed facts set out in the stipulation, the reports were not "substantially true," and Petitioner was deprived of this as a defense only because the facts wholly failed to support that defense. This was simply the result of the usual judicial processes and in no way affected Petitioner's constitutional rights under the First Amendment.

As to malice, it has been shown earlier that the standards applied in the Trial Court comported with the "federal rule" set out in *New York Times* (Respondent's Footnote 7). But if the facts were to be further examined[10] there are other distinguishing features between *New York Times* and this case.

First, the Times did not prepare the content of the advertisement. It accepted it for publication from persons believed to be reliable and responsible. As an advertisement, the Times made no warranty of its accuracy, and its readers could take it or leave it as they wished. Times had no knowledge of the falsity. Under these facts, the Court held that the failure to investigate the accuracy of the content amounted to nothing more than negligence, and was constitutionally insufficient, under the "federal rule," to establish malice.

Here, however, the entire content of the reports was conceived, prepared, and circulated by Petitioner's own representatives. This was factual reporting, upon the accuracy of which the recipients could be expected to rely

[10] Both the Trial Court and Court of Appeals decided that there was "substantial evidence" to support the jury's finding of malice. (Appendix to Petition, 20a, 25a-26a; 8a)

Petitioner's sole objection was that there "was no substantial competent evidence of malice." (R. 532; 543-44)

and to take action, in respect to their business dealings with Plaintiff.[11]

Not only was there failure to investigate, but Petitioner had no system for avoiding the dissemination of false reports (R. 115-116; 125; 153), especially where, as here, the reports were not of a routine nature. The reckless handling of the reports in the Little Rock office is exemplified in the attitude of the Service Manager, Mr. Siegel (Respondent's Footnote 1), when he supervised the preparation and circulation of the March 6, 1961 report (Petition, 6), with knowledge that the reference to "lien on bank account" was in fact false (R. 140, 146).

Because of these differences in the facts and in the purposes served by the publications, *New York Times* furnishes no criterion for this Court to undertake an examination of the facts relating to malice.

---

[11] The peculiar responsibility of Petitioner in such matters was noted in the earlier case of *Dun & Bradstreet* v. *Robinson*, 233 Ark. 168, 345 S. W. 2d 34, involving also the "reckless disregard" of Petitioner in sending out its reports. There the Supreme Court of Arkansas said:

> "Dun & Bradstreet enjoys the implicit confidence of its subscribers, as attested by witnesses in the cause before us. This confidence in the accuracy of Dun & Bradstreet reports places an even greater responsibility upon the company, and requires that its reports be compiled with regard to the effect that such report may have upon the rights or feelings of the person reported on, if it should develop that the information given is false." 345 S. W. 2d 34, 39.

CONCLUSION

This is not such an "exceptional" case as to require this Court to consider issues not properly raised in the courts below. In any event, it has been shown that the libel, being of a commercial and private nature, is not constitutionally protected.

The case was tried in the traditional way, according to standards approved in *New York Times*. It has already had the careful consideration of the District Court and Court of Appeals on the questions of instructions, malice and sufficiency of the evidence. Petitioner has not been without its day in court, and there is no such important or compelling public matter involved as to require further review by this Court. The Petition for Certiorari should be denied.

Dated August 2, 1965.

Respectfully submitted,

D. D. Panich
Boyle Building
Little Rock, Arkansas 72201
Counsel for Respondent.

Henry W. Gregory, Jr.
H. Murray Claycomb
Simmons National Building
Pine Bluff, Arkansas 71601
Of Counsel.